

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES K. CURRY)	
Claimant)	
)	
VS.)	
)	
DURHAM D & M LLC)	
Respondent)	Docket No. 1,051,135
)	
AND)	
)	
OLD REPUBLIC INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 31, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Kip A. Kubin, of Leawood, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the July 30, 2010, preliminary hearing transcript; the August 11, 2010, preliminary hearing transcript, with exhibits; the February 17, 2011, preliminary hearing transcript, with exhibits; the April 26, 2011, motion hearing transcript, with exhibits; the February 7, 2012, preliminary hearing transcript, with exhibits; the January 24, 2013, preliminary hearing transcript, with exhibits; the July 29, 2010, evidentiary deposition of Clinton Pepper, with exhibits; and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found:

There is no specific degree of aggravation necessary to invoke the employer's duty to provide the medical care necessary to cure and relieve the effects of claimant's injury. Claimant's testimony that his knee problem grew worse over the course of time performing his work duties is unchallenged.

Having reviewed the record, the Court finds the claimant aggravated his previous injury to his knee through his work activities as fully described in the Board order of 10/28/10. Claimant suffered personal injuries by accident which arose out of and occurred in the course of his employment with the respondent. Claimant's filing of written claim constituted timely notice. Temporary total disability is awarded at the rate of \$166.68 per week from the date it was cut off and medical care with Dr. Pratt and all referrals.

Respondent asserts claimant's left knee injury was not caused by repetitive work activities that gave rise to this claim, but rather was caused by a December 2007 fall, which resulted in Docket No. 1,051,134. Respondent argues the ALJ's Order reinstating claimant's temporary total disability (TTD) benefits and medical treatment should be vacated.

Claimant argues the Board does not have jurisdiction to review the ALJ's preliminary order. In the alternative, claimant argues the ALJ's Order should be affirmed.

The issues raised on review are:

1. Does the Board have jurisdiction to review whether the ALJ erred in ordering medical treatment and temporary total disability benefits?
2. If so, did claimant's left knee injury result from a series of repetitive accidents arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Since 2005, claimant has been receiving \$1,096 a month in SSDI benefits. In December 2007, claimant was working for respondent when he slipped and fell in a parking lot injuring his left knee. Claimant filed an application for hearing that resulted in Docket No. 1,051,134. The ALJ in that claim determined claimant failed to give timely notice of that accident.

Following the December 2007 fall, claimant continued to work as a bus driver, 22-26 hours per week, for respondent even though claimant was still having problems with his knee. Claimant asserts that following the 2007 fall, his repetitive work activities at respondent from January 2008 until he was terminated in November 2009, aggravated or accelerated his left knee and back injuries.

This is the fourth time this matter has been appealed to the Board from an ALJ's preliminary hearing order. On October 28, 2010, a Board Member found claimant gave

timely notice and that claimant's left knee and back injuries by repetitive accident arose out of and in the course of his employment with respondent on June 14, 2010. A second appeal resulted in an April 22, 2011, Board order, wherein a Board Member determined that although claimant's date of accident was after he was no longer employed by respondent, claimant was legally an employee of respondent on the date of accident. A third appeal concerning the issue of claimant's medical treatment resulted in a September 20, 2012, Order, wherein a Board Member remanded the matter to the ALJ for further hearing.

Respondent terminated claimant's TTD benefits in September 2012. Claimant asked at the January 24, 2013, preliminary hearing that TTD benefits be reinstated and for medical treatment of his left knee.

Claimant testified:

Just kept working and getting, you know, up and out -- up in -- in the school bus, getting out, obviously, walking up through the aisles of the school bus to make sure nobody was left, you know, asleep or fell out under the seats, fell asleep or whatever, left anything on there. It's federal law that you have to do it anyway, but we do it. And every month you had to do an emergency drill. You had to get -- jump off the back, open the emergency door and jump down and make sure everybody got off okay, go to a certain area and make sure everybody was accounted for.¹

Dr. P. Brent Koprivica performed an independent medical evaluation on October 19, 2011, regarding Mr. Curry. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Koprivica opined:

Based on the information I have available at this point, I do not believe that one can determine within a reasonable degree of medical certainty that Mr. Curry sustained any permanent injury based upon the series of injuries from his employment activities with Durham School Bus Services as a bus driver through November of 2009.

In coming to this conclusion, first, in reference to the left knee, I would consider the direct injury to the knee that occurred in the fall in January of 2007 to be the significant injury to the left knee.

Mr. Curry was driving an automatic school bus. Based on that history, I do not believe there is any significant exposure to risk which resulted in any permanent aggravation, acceleration or intensification of the impairment involving the left knee.²

¹ P.H. Trans. (Jan. 24, 2013) at 8.

² *Id.*, Resp. Ex. B at 18.

On May 15, 2012, Dr. Terrance Pratt performed a court-appointed independent medical examination on claimant. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Pratt diagnosed claimant with the following: (1) low back pain without significant evidence of lumbosacral radiculopathy; (2) mild degenerative joint disease in the left knee with patellofemoral involvement; (3) chronic pain syndrome with reported fibromyalgia; (4) depression; and, (5) cervical liposarcoma, coronary artery disease and hypertension. Utilizing the *Guides*,³ Dr. Pratt opined claimant had a 12% functional impairment to the left lower extremity with 5% preexisting.

Dr. Pratt, opined:

There was a question concerning in some of the records repetitive activities or a specific event resulting in his involvement. His involvement of the knee and low back related to a specific vocationally related event in 2007. He reported some mild increase in symptoms after returning to work. I do not believe that those activities resulted in the involvement. The cause of his stated impairment was the reported fall.⁴

PRINCIPLES OF LAW AND ANALYSIS

1. Does the Board have jurisdiction to review whether the ALJ erred in ordering medical treatment and temporary total disability benefits?

Claimant alleges that the Board has no jurisdiction to review this matter, because the Board does not have jurisdiction under K.S.A. 2009 Supp. 44-534a(a)(2) to review whether the ALJ erred in ordering medical treatment and TTD benefits. It also asserts that the ALJ and Board have already decided that claimant's left knee injury resulted from a series of repetitive accidents arising out of and in the course of his employment with respondent. Respondent counters by arguing that the Board has jurisdiction to review this matter because the underlying issue remains whether claimant's left knee injury resulted from a series of repetitive accidents arising out of and in the course of his employment or from a 2007 accident.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁵ This includes review of the preliminary hearing issues listed in K.S.A. 2009 Supp. 44-534a(a)(2) as jurisdictional

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁴ P.H. Trans. (Jan. 24, 2013), Resp. Ex. A at 5.

⁵ K.S.A. 2009 Supp. 44-551(i)(2)(A).

issues, which are: (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.

The Board acknowledges that it does not have jurisdiction to review whether a worker satisfies the definition of being temporarily and totally disabled. Nor does the Board have jurisdiction to review whether a claimant proved a need for medical treatment. However, the underlying issue in this claim is whether claimant’s left knee injury resulted from a series of repetitive accidents with an accident date of June 14, 2010, or whether the left injury resulted from claimant’s 2007 accident.

While it is true that a Board Member in an October 28, 2010 Order decided that claimant’s left knee injury resulted from a series of work-related repetitive accidents, additional evidence in the form of Dr. Pratt’s IME report has been presented. It is not uncommon for multiple preliminary hearings to be held and multiple preliminary hearing orders to be issued concerning a single issue. In *Wiehe*,⁶ claimant tested positive for marijuana. The Kansas Court of Appeals noted that following two preliminary hearings in January and April 2006, the ALJ issued preliminary hearing orders that respondent failed to prove claimant’s impairment from using marijuana contributed to his accident. Respondent then took the testimony of a toxicologist at a third preliminary hearing. Based upon the toxicologist’s testimony, the ALJ issued a third preliminary hearing order finding that claimant’s impairment contributed to his accident. Simply put, the fact that a Board Member previously ruled claimant’s left injury was the result of a series of repetitive work-related accidents does not preclude the Board from having jurisdiction to review that issue.

2. Did claimant’s left knee injury result from a series of repetitive accidents arising out of and in the course of his employment with respondent?

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

⁶ *Wiehe v. Kissick Const. Co.*, 43 Kan. App. 2d 732, 232 P.3d 866 (2010).

⁷ K.S.A. 2009 Supp. 44-501(a).

⁸ K.S.A. 2009 Supp. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹

Drs. Pratt and Koprivica opined claimant's left knee injury was likely caused by the 2007 fall, not repetitive work activities after the fall. Those physicians reviewed claimant's medical records, took a history from claimant and physically examined claimant. No physician has opined that claimant's left knee injury was the result of work-related repetitive traumas.

Claimant testified that in January 2007, he sustained injuries, including a left knee injury, from a fall. From January 2008 until his last day worked for respondent, claimant's left knee injury allegedly worsened as a result of his repetitive work activities. ALJ Avery relied heavily on the testimony of claimant in concluding that claimant's left knee injury was the result of his repetitive work activities and downplayed the medical evidence. It is puzzling that ALJ Avery completely spurned the causation opinion of Dr. Pratt, a neutral physician, in favor of claimant's testimony. After taking into consideration all of the evidence, not just claimant's testimony, this Board Member finds claimant failed to prove his left knee injury was a result from a series of repetitive accidents arising out of and in the course of his employment with respondent.

CONCLUSION

1. The Board has jurisdiction to review the ALJ's Order.
2. Claimant failed to prove by a preponderance of the evidence that his left knee injury was a result from a series of repetitive accidents arising out of and in the course of his employment with respondent. Therefore the ALJ's order that respondent provide TTD benefits and medical treatment for claimant's left knee is vacated.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member finds that the January 31, 2013, preliminary hearing Order entered by ALJ Brad E. Avery is reversed.

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

¹⁰ K.S.A. 44-534a.

¹¹ K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

e: Roger D. Fincher, Attorney for Claimant
rdfincher@ksjustice.com; teri@ksjustice.com
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
kak@kc-lawyers.com; cdb@kc-lawyers.com
Brad E. Avery, ALJ